EX PARTE OR LATE FILED

McLeodUSA®

March 16, 2005

EX PARTE - VIA ELECTRONIC FILING

ORIGINAL

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *Ex Parte Letter of McLeodUSA Telecommunications Services, Inc. in Support of Level 3 Petition for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of 47 U.S.C. § 251(g), Rule 51.701(b)(1), and Rule 69.5(b)*, WC Docket 03-266; *In the Matter of IP-Enabled Services*, WC Docket No. 04-36.

Dear Ms. Dortch:

McLeodUSA Telecommunications Services, Inc. (McLeodUSA)[1] submits this letter in support of Level 3 Communications LLC's ("Level 3") Petition for Forbearance (the "Petition") filed with the Federal Communications Commission ("FCC" or "Commission") in the above referenced docket.[2] McLeodUSA understands that Level 3's Petition, if granted by the Commission, would preserve the status quo by precluding the imposition of access charges on certain Internet Protocol ("IP") enabled[3] voice traffic exchanged between non-rural carriers,[4] and ensure that such traffic continues to fall under the reciprocal compensation system.

Grant of Level 3's Petition at this time is critical to McLeodUSA and other facilities-based CLECs. Several non-rural ILECs have already engaged in self-help measures. These ILEC self-help measures attempt to unilaterally impose access charges on CLECs that provide local services to IP-enabled voice service providers. These ILECs are demanding that CLECs serving IP-enabled voice providers police the network on their behalf. In short, the ILECs seek to deter CLECs from serving IP-enabled providers by imposing costly burdens on CLECs in the form of foisting on CLECs the impossible task of devising new methods for determining the

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[1] McLeodUSA is a competitive telecommunications service provider, offering integrated local, long distance, wireless, data, Internet and advanced communications services to homes and businesses in 25 Midwest, Southwest, Northwest, and Rocky Mountain states. McLeodUSA is a facilities based carrier with approximately 400,000 customers. More information on McLeodUSA is available at http://www.mcleodusa.com.

[2] *See Petition for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of 47 U.S.C. § 251(g), Rule 51.701(b)(1), and Rule 69.5(b)*, WC Docket 03-266 (filed Dec. 23, 2003) ("Level 3 Petition" or "Petition").

[3] For purposes of these comments, IP-enabled voice services means voice services that are transmitted between the IP end user and the IP provider in IP format.

[4] Level 3's Petition does not apply to IP-enabled traffic exchanged with a rural incumbent local exchange carrier ("RLEC") that qualifies for a Section 251(f) exemption. *See* Level 3 Petition at 8.

geographic end points of IP-enabled voice traffic.[5] In fact, McLeodUSA has already received unsupported bills for unlawful access charges arising from the local services that it provides to IP-enabled service providers, even though it may be impossible to determine the geographic location of the IP end of an IP-PSTN communication. Immediate resolution of this issue in favor of Level 3 and other CLECs serving IP-enabled service providers, such as McLeodUSA, is crucial to the promotion of facilities-based local competition and the development of IP-enabled services.

It Is Impracticable And Possibly Impossible to Determine the Geographic End Point of the IP End of an IP-Enabled Voice Communication In Order To Impose Access Charges On Such Traffic

There is no fixed relationship between an assigned telephone number and the physical geographic location of the IP end (or ends) of an IP-enabled voice communication.[6] In their demands for access charges on IP-enabled traffic, ILECs ignore these practical difficulties of rating such traffic and seek to foist on CLECs the burden of determining access jurisdiction. The Commission should grant Level 3's petition to put an end to ILEC self-help.

In granting pulver.com's Petition, the Commission recognized that "it is impossible or impracticable to attempt to separate FWD [pulver's IP-enabled voice service] into interstate and intrastate components."[7] The Commission understood that this "'impossibility' results from the global portability feature" of pulver's IP-enabled voice service where a user can "initiate and receive on-line communications from anywhere in the world where it can access the Internet via a broadband connection."[8] Likewise, in its *Vonage Order*, the Commission noted that "Vonage's service is fully portable; customers may use the service anywhere in the world where they can find a broadband connection to the Internet;" and the NANP number used "is not necessarily tied

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[5] *See, e.g.*, Broadwing Comments, at 5-6 ("ILECs are . . . demanding that carriers that service or provide IP-enabled services find ways to identify the location of an IP-PSTN communication and pay access charges whenever the IP end of a communication[] is in a different LEC local calling area that the PSTN end."); ICG Comments, at 4 ("RBOCs are threatening to impose access charges on CLECs that provide local telecommunications services to VoIP providers and are otherwise attempting to force CLECs to act as the RBOC's policeman."); Global Crossing Comments, at 4 ("[b]y refusing to provision local services, or by unilaterally imposing access charges on traffic routed over terminating arrangements . . . the incumbent LECs have exploited their control over local markets to create a competitive imbalance favoring their legacy exchange access revenues.") Unless otherwise indicated, all citations to Comments or Reply Comments refer to comments filed in this docket, WC Docket No. 03-266.

[6] Level 3 Reply Comments, at i-ii, 18.

[7] *Petition for Declaratory Ruling that Pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, WC Docket No. 03-45, Memorandum Opinion and Order, 19 FCC Rcd 7457, at ¶ 22 (Feb. 19, 2004) ("*Pulver Order*").

[8] *Pulver Order*, at 22.

to the user's physical location for either assignment or use."[9] This same "portability feature" is an enhanced feature available in the services offered by Vonage, Level 3 and many other IP-enabled voice service providers.[10] In fact, this "portability feature," which is an innate characteristic of IP-enabled communications, is one of the key enhanced features that the Commission underscored create "fundamental differences" between circuit switched voice services and IP-enabled voice services.[11] Thus, it is impracticable, if not impossible, to determine the geographic end points of IP-enabled communications.

Even SBC reaches this conclusion with respect to its "IP-platform services" in its own Petition, where it explains that "there is no feasible way for carriers to track, on a bit-by-bit basis, the exact content or routes of [] packets on an IP platform."[12] Nevertheless, SBC argues that the telephone number associated with the IP end of an IP-PSTN communication should be used to rate the call for access charge purposes.[13] Moreover, SBC and the other RBOCs seek to impose access charges for every IP-enabled service that touches the PSTN.[14] The ILEC position would force CLECs and IP-enabled service providers to develop geographic packet-tracking techniques that even SBC has characterized as "useless" and "inefficient."[15] Under the ILEC position, if the CLECs and IP-enabled service providers fail to develop such tracking mechanisms, they would be forced to pay access charges even for traffic for which a circuit switched carrier would pay (and in some cases receive) reciprocal compensation.[16] Level 3 proposes a more practical solution to this problem. Pending completion of broader intercarrier compensation reform, the Commission should continue to apply reciprocal compensation to IP-enabled voice traffic and forbear from applying access charges (to the extent they even could be construed to apply to such traffic in the first instance).[17]

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[9] *In the Matter of Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211, Memorandum Opinion and Order, at ¶¶ 5, 9 (Nov. 12, 2004) ("*Vonage Order*").

[10] *Vonage Order*, at ¶¶ 5, 9.

[11] *Vonage Order*, at ¶¶ 5, 9, 23-25 ("Vonage has no service-driven reason to know users' locations").

[12] *Petition of SBC Communications, Inc. for a Declaratory Ruling,* WC Docket No. 04-29, 37-38 (Feb. 5, 2004) ("SBC Petition") ("Such tracking theoretically could be 'possible,' if one embraces the principle that with enough time and money *anything* is possible from a technological perspective. But there is no *service driven* reason for committing those resources to develop such tracking capabilities.").

[13] SBC Petition, at 39 n.76.

[14] *See* Verizon Comments, at 6-7; BellSouth Comments, at 5-6; SBC Comments at 9-13.

[15] SBC Petition, at 38.

[16] *See, e.g.*, Pinpoint Communications Comments, at 3 (applying access charges would "force VoIP applications developers to have to try to engineer their products to fit into circuit-switched regulatory concepts, instead of focusing on sound engineering and enhanced user capabilities"); Level 3 Reply Comments, at iii-iv, 18.

[17] Level 3 Reply Comments, at ii.

Granting Level 3's Petition Will Create a Virtuous Circle That Prompts Increased Facilities-based Local Competition, Investment and Innovation in the Expanding IP-Enabled Services Industry, and Greater Broadband Adoption

The Commission recognized in its *IP-enabled Services NPRM* that "the rise of IP-enabled communications promise[s] to be revolutionary" and is "expected to reduce the cost of communications" and to "spur innovation and individualization, giving rise to a communications environment in which offerings are not designed to fit within the limitations of a legacy network"; but rather, "to provide each end user with a highly customized, low-cost suite of services delivered in the manner of his or her choosing."[18] The Commission noted that "IP-enabled services can be created by users or third parties, providing innumerable opportunities for innovative offerings competing with one another over multiple platforms and accessible wherever the user might have access to the IP network."[19] In this context, the Commission envisioned a virtuous circle of innovation and investment in which emerging IP-enabled services, especially VoIP, "will encourage consumers to demand more broadband connections, which will foster the development of more IP-enabled services."[20]

Granting Level 3's Petition will foster the virtuous circle of increased innovation and investment envisioned by the Commission. It will do so by reducing business risks for CLECs serving IP-enabled service providers. Without such assurance, CLECs face the choice of either litigating the applicability of access charges and/or reserving precious capital assets pending resolution of billing disputes. Absent this forbearance, CLECs and their IP-enabled service provider customers will be forced to incur the unwarranted costs of inefficient business models and network architectures, unnecessarily expending vital resources on the useless exercise of developing IP packet tracking technologies solely to facilitate the imposition of the antiquated access charge regime.[21]

Based on the QSI analysis, it is clear that ILECs have motives other than revenue enhancement in mind. ILECs in general, and the BOCs in particular, are naturally obstructionist. By their nature as monopolists, they find any means available to stifle, thwart, and impede the development of competition. Their strategy over the past eight years has been to identify uncertainties in the regulatory regime and exploit them to create uncertainty in the market. In short, RBOCs have made an art form of creating regulatory lag to harm competitors, and, consequently, competition. Because CLECs have been successful in winning the local service business of IP-enabled service providers, the ILECs' latest gambit is to squash this CLEC market

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[18] *In the Matter of IP-Enabled Services*, WC Docket No. 04-36, Notice of Proposed Rulemaking, at ¶ 5 (March 10, 2004) ("*IP-Enabled NPRM*").

[19] *IP-Enabled NPRM*, at ¶ 4.

[20] *IP-Enabled NPRM*, at ¶ 5; Level 3 Reply Comments, at 21.

[21] Level 3 Reply Comments, at 41-42.

opportunity by demanding access charges for calls using IP-enabled services. The mere threat of having to pay above-cost access charges to send traffic to the ILECs' customers, rather than forward looking cost-based reciprocal compensation, has had a chilling effect on the CLEC industry. As discussed below, this regulatory uncertainty is a fabrication—since 1983, all ESP traffic has been exempt from access charges—but the ILECs have succeeded in gumming up CLEC business plans nonetheless. Granting the Level 3 Petition would promote facilities-based local competition in at least two ways. First, it would tie intercarrier compensation to forward-looking costs and provide certainty to the CLEC industry that calls using IP-enabled services will be treated the same as all other ESP traffic. Second, it would send a clear signal to ILECs that their strategy of stifle, thwart and impede will not be tolerated.

Liberating IP-enabled services from the antiquated access charge system will also promote increased investment and innovation in such services, thereby speeding up the product development cycle to make available a host of innovative enhanced features including: integration of voice with real-time video; unified messaging; automated voice mail attendants; the ability to detect a user's presence on the network; privacy protection and safety through customized call screening and routing; and communications routing pursuant to sophisticated user specified preferences such as time of day, calling party number and other parameters.[22] As the FCC noted in its *Vonage Order*, some of these innovative IP-enabled applications are already available, such as the ability to manage an integrated suite of personal communications dynamically on a world wide basis, receive voicemails in emails with the message attached as a sound file, or play voicemail messages through a computer.[23] The pace of innovation in the IP-enabled services market will increase if these services are allowed to continue to develop free of the antiquated access charge regime. It is hard to underestimate the full breadth of beneficial impact such innovations will have upon the U.S. economic engine.

The ILECs would rather slow their IP-enabled service competitors' progress so that they can play catch-up and acquire a dominant share in this burgeoning new market. These attempts to thwart IP investment and innovation harms not only these small IP-enabled service providers, but also the CLECs that serve them. Given the current regulatory climate, CLECs that could offer IP-enabled service providers significantly better local service pricing than ILECs are reluctant to sign these providers up as customers given the ILECs' demands for separate trunk groups and access charges.

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[22] Level 3 Petition, at 3, 11-14.

[23] *Vonage Order*, at ¶¶ 4-7; *IP-Enabled NPRM*, at ¶¶ 16-20 (March 10, 2004) (IP-enabled services "might include virtual telephone numbers, directory dialing, automated voicemail attendants, call pre-screening, and call forwarding of pre-screened calls to other IP-enabled devices, such as a computer or wireless phone.").

In addition to promoting competition and investment in IP technologies, the Commission has accurately foreseen that continued innovation in IP-enabled services encourages broadband deployment. In order to avail themselves of these new and attractive services, customers of IP-enabled services must have broadband access.[24] Ensuring that IP-enabled services remain free from legacy access charges will accelerate demand for broadband services. In fact, the *QSI Report* has shown that granting Level 3's Petition will stimulate broadband adoption to the point that non-rural ILECs will see DSL revenues increase by $269 million between 2005 and 2008.[25] To the contrary, higher prices for IP-enabled voice services, which will necessarily ensue from the application of legacy access charges, would suppress demand for both IP-enabled voice services and the broadband services that facilitate them.[26] The *QSI Report* demonstrates that non-rural ILEC revenues for DSL will drop by approximately $39 million in 2005, $56 million in 2006, $76 million in 2007, and $98 million in 2008, due to suppressed demand for DSL caused by imposition of legacy access charges on IP-enabled voice traffic.[27] As further demonstrated by the *QSI Report*, the DSL revenues that might be "lost" offset the increase in ILEC switched access revenues, mitigating the total increase in ILEC revenues obtained by applying access charges to such traffic.[28]

Retroactive Application of Access Charges on the Dynamic IP-enabled Services Industry Would Contradict Over Two Decades Of Prior Commission Precedent Upon Which Providers Have Justifiably Relied

It would directly contradict more than two decades of this Commission's established precedent to now require payment of access charges for IP-enabled voice traffic. To also require such payment on a retroactive basis would severely harm CLECs that have justifiably relied on twenty years of Commission precedent that access charges would not be owed to ILECs for IP-enabled voice traffic. As early as 1983, the Commission determined not to apply legacy switched access charges to "enhanced" service providers ("ESPs") in order to promote the development of the nascent ESP industry.[29] The Commission determined that to avoid "rate shock" and to have "time to develop a comprehensive plan for detecting all such usage and

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[24] *See IP-Enabled NPRM*, at ¶ 5 ("IP-enabled services generally – and VoIP in particular – will encourage consumers to demand more broadband connections, which will foster the development of more IP-enabled services. IP-enabled services, moreover, have increased economic productivity and growth, and bolstered network redundancy and resiliency.").

[25] Level 3 Ex Parte, WC Dockets Nos. 03-266, 04-36, (Jan. 27, 2005), QSI Technical Documentation, *IP-Enabled Voice Services, Impact of Applying Switched Access Charges to IP-PSTN Voice* Services, at 5 and Table 2 ("*QSI Report*").

[26] *QSI Report*, at 5, 7.

[27] *QSI Report*, at 5 and Table 2.

[28] *QSI Report*, at 5.

[29] *MTS and WTS Market Structure*, Memorandum Opinion and Order, 97 FCC 2d. 682, 711 (¶ 76) (1983).

imposing charges in an even-handed manner," it would treat ESPs as end users, rather than carriers, with respect to carrier access charges. Consistent with this policy, the FCC limited the application of carrier charges to "interexchange carriers."[30] Thus, as the FCC acknowledged when it later reviewed its Part 69 rules as they related to enhanced services providers, "[u]nder our present rules, enhanced service providers are treated as end users for purposes of applying access charges."[31]

The treatment of ESPs as end users for the purposes of applying access charges was carried over in the 1996 Act,[32] which mirrors the definitions of "basic" and "enhanced" services in its terms "telecommunications service" and "information service."[33] Moreover, the Act defines a "telecommunications carrier" as a provider of telecommunications services, and it clarifies that a telecommunications carrier cannot be a common carrier with respect to services that are not telecommunications services.[34] Thus, information service providers, like their predecessor ESPs, are even more clearly end users, not carriers, under the terms of Rule 69.5.[35]

Since the adoption of the 1996 Act, the FCC has reaffirmed information service providers' status as end users, rather than interexchange carriers, under Rule 69.5.[36] In its First Report & Order in the Access Reform docket, the Commission (referring to both ESPs and providers of information services as information service providers)[37] noted that since the 1983 Access Charge Reconsideration Order, "ISPs may purchase services from incumbent LECs under the same intrastate tariffs available to end users." "ISPs may pay business line rates and the appropriate subscriber line charge, rather than interstate access rates, even for calls that

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[30] *Id.* at 715 (¶ 83); 47 C.F.R. § 69.5(b).

[31] *Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers*, 3 FCC Rcd. 2631 (¶ 2 n.8) ("*ESP Exemption Order*").

[32] The broadly applicable end-user classification had been affirmed again in 1991. *See Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Sub elements for Open Network Architecture Policy and Rules Concerning Rates for Dominant Carriers*, Report and Order and Order on Reconsideration and Supplemental Notice of Proposed Rulemaking, 6 FCC Rcd 4524, 4535 (¶ 60) (1991).

[33] *See* 47 U.S.C. §§ 153(46), 153(20).

[34] *See* 47 U.S.C. §§ 153(20), (43), (44), (46).

[35] While the definition of "information services" is not identical to the definition of "enhanced services," "all of the services that the Commission has previously considered to be 'enhanced services' are 'information services.'" *Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended,* First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd. at 21905, 21955 (¶ 102) (1996).

[36] *See Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Transport Rate Structure and Pricing End User Common Line Charge, First Report and Order*, 12 FCC Rcd. 15982 (1997)("*Access Charge Reform Order*"), *aff'd* 153 F.3d 523 (8th Cir. 1998).

[37] *See Id.* at 16131 (¶ 341 n.498).

appear to traverse state boundaries."[38] The Commission then made clear that it was not altering that classification or its effect under Rule 69.5: "We decide here that [information service providers] should not be subject to interstate access charges."[39] The Commission thus foreclosed all doubt as to whether the change in terminology from "enhanced service" to "information service" in the 1996 Act somehow altered the so-called "ESP exemption." Moreover, as in all previous orders dealing with the exemption, the Commission did not distinguish between various types of information service providers based on their use of the underlying PSTN.

The Commission's *Report to Congress* released in 1998 also did not change the Commission's long standing policy of applying the ESP Exemption to IP-enabled voice services. In the 1998 *Report to Congress*, the Commission merely found that it was "not appropriate to make any definitive pronouncements" regarding the proper categorization of "phone-to-phone" IP telephony "in the absence of a more complete record focused on the individual service offerings."[40] The Commission deferred the issue "pending the development of a more fully-developed record."[41] As to access charges, the Commission stated that to the extent it at some future date concluded "that certain forms of phone-to-phone IP telephony are 'telecommunications services,'" it may at that time also "find it reasonable" that providers of such services "pay similar access charges" to those paid by long distance providers.[42] The Commission recognized, however, that "we will likely face difficult and contested issues relating to the assessment of access charges on these providers" and decided to examine the issue in a future proceeding based upon a more complete record.[43] Thus, the *Report to Congress* did not change the status quo, which was and continues to be the rejection of the access charge regime for IP-enabled voice communications.

More recently, the Commission stated in its intercarrier compensation NPRM that "IP telephony [is] generally exempt from access charges under the enhanced service provider (ESP) exemption."[44] In light of over two decades of consistent Commission precedent discussed

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[38] *Id.* at 16132 (¶ 342).

[39] *Id.* at 16133 (¶ 345). Because "the access charge system contains non-cost-based rates and inefficient rate structures," the Commission believed that the rule was still needed to promote the "still-evolving information services industry." *Id.*, at 16133 (¶ 344-345). The Commission also discredited the theory that nonassessment of access charges results in information service providers imposing uncompensated costs on ILECs (*see id.* at 16133-34 (¶ 346)), as well as ILEC allegations regarding network congestion. *See id.* at 16134 (¶ 347).

[40] Federal-State Board on Universal Service, *Report to Congress*, 13 FCC Rcd 11501, 11544, at ¶ 90 (1998) ("*Report to Congress*").

[41] *Report to Congress*, 13 FCC Rcd 11544, at ¶ 90.

[42] *Report to Congress*, 13 FCC Rcd 11544-45, at ¶¶ 90-91.

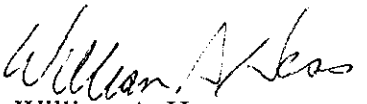
[43] *Id.*

[44] *In the Matter of Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, FCC 01-92, Notice of Proposed Rulemaking, 16 FCC Rcd 9610, 9613 (¶ 6) (April 27, 2001) ("*Intercarrier Compensation NPRM*").

above,[45] it would be unfair and contradictory for the Commission, at this late date, to require the payment of access charges on a retroactive basis, even if the Commission reversed twenty years of precedent and decided to do so going forward.[46] A determination by the Commission to apply access charges to IP-enabled voice services would be a "new rule" that under established precedent should not be given retroactive effect.[47] Instead, the FCC should confirm that the services described in Level 3's Petition are exempt enhanced services or information services, and as such the access charge exemption applies both prospectively and retroactively.

For the foregoing reasons, McLeodUSA urges the Commission to grant Level 3's Petition.

Sincerely,



William A. Haas
Associate General Counsel

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[45] *See generally Level 3 Communications LLC Petition for Forbearance Under 47 U.S.C. § 160(c) and Section 1.53 of the Commission's Rules from Enforcement of Section 251(g), Rule 51.701(b)(1), and Rule 69.5(b)*, Reply Comments of Level 3 Communications LLC, WC Docket No. 03-266 (filed July 14, 2004). *See also id.* at 21-35 (explaining that net protocol conversion has historically been used to determine which services are intrinsically information services).

[46] Prompt resolution of this matter in favor of Level 3, and the rejection of retroactive application, is also important lest Level 3, and possibly other CLECs serving IP-enabled service providers, incur a liability similar to that recently incurred by AT&T in the prepaid calling card case.

[47] *Verizon v. FCC*, 269 F.3d 1098, 1100, 1109 (D.C. Cir. 2001) ("when there is a 'substitution of new law for old law that was reasonably clear,' the new rule may justifiably be given prospective[]-only effect in order to 'protect the settled expectations of those who had relied on the preexisting rule.'").